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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 153

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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OCTOBER TERM, 1962

No.....

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Earl Warren,
Chief Justice of the United States,
and the Associate Justices of the
Supreme Court of the United States:

Petitioner, Trunkline Gas Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause January 9, 1963.

OPINION BELOW

The District Court did not render an opinion. The opinion of the Court of Appeals (R. 238-243) is reported at 311 F. 2d 882. The opinion and judgment of the Court of Appeals are set out in full in Appendix A, *infra*, pp. 15-21.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1963 (R. 244). Petitioner timely filed its petition for rehearing on January 26, 1963 (R. 245-263), and the Court of Appeals overruled such petition by order entered on February 27, 1963 (R. 275). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether Texas counties have legal authority to compensate for casing of pipe lines in private easements when the casing is required for construction of new State highway facilities across such easements.

2. Whether a requirement that a pipe line be cased under a private pipe line easement by its owner, for new highway construction by the State across the easement, constitutes a taking of the easement.

STATUTES INVOLVED

The pertinent statutes are Vernon's Annotated Civil Statutes, Articles 6673, 6674c-1, 6674n and 6674q-4. Such statutes, together with the volume and page where each may be found in the official edition, are set out in Appendix B, *infra*, pp. 22-25.

STATEMENT

This suit, in which federal jurisdiction is based upon diversity of citizenship, was brought by Petitioner, a natural gas pipe line company incorporated under the laws of Delaware, to recover the cost of casing its pipe line required for the construction of new highway facilities on right of way acquired by Respondent, a county of the State of Texas, across Petitioner's pipe line easements and the line located therein. (R. 2-8)

In 1951 Petitioner purchased pipe line easements from the owners of lands abutting U. S. Highway 69 and F. M. Highway 418 in Hardin County, Texas, and constructed its pipe line thereunder (R. 14, 19, 233-235). Petitioner also constructed its line under and across each of said highways and at the time cased that portion of its line under the entire width of the highway rights of way as same then existed (R. 14, 19).

Thereafter, the State Highway Department determined to widen said highways, which necessitated the acquisition of new and additional rights of way. Such new and additional rights of way crossed Petitioner's pipe line and easements. The State Highway Department required that Respondent, at its own cost, acquire the necessary additional rights of way across Petitioner's pipe line and easements for the two construction projects free and unencumbered and free of all obstructions and encroachments, without any cost or expense to the State (R. 86, 104, 125-127). Respondent agreed and undertook so to acquire said new rights of way (R. 103, 115, 130, 141, 149, 204, 255).

Because the uncased pipe line constituted an obstruction in the new highway rights of way (R. 86, 104, 115), the Highway Department required that Petitioner's pipe line be cased under those portions of Petitioner's private easements to be crossed by the new highway facilities, and requested that Petitioner install the required casing (R. 87, 95, 112, 126, 190-194, 214-217, 218). Petitioner refused to do the casing without assurance that it would be reimbursed for the cost of the work (R. 15, 20, 197, 219). The Highway Department officials considered the matter of Petitioner's compensation for casing its pipe line under the new highway rights of way to be a part of Respondent's responsibility to acquire the rights of way as above set out (R. 83-87, 101-105, 115, 125-127). Therefore, when Petitioner raised the ques-

tion of compensation, the officials referred it to Respondent (R. 117-118, 126-127, 198).

The Highway Department would not begin construction until the casing was done (R. 127). So, Respondent then undertook to have Petitioner's line cased under the new highway rights of way and requested that Petitioner do the work without compensation. (R. 16, 21, 130-131, 141, 180-182, 220, 226). In this connection, Respondent's County Judge admitted that the County was the proper agency to have Petitioner's pipe line cased (R. 181) and that Respondent had handled such matters in connection with these and other highway construction projects (R. 132, 136, 181, 182).

Petitioner again refused to case the portions of its pipe line in its private easements to be crossed by the new highway rights of way without compensation (R. 16, 21, 142, 202, 227). Because of Petitioner's refusal to install casing under the new right of way for Highway 69, Respondent's Commissioners' Court adopted an order on May 23, 1955, providing:

> "Trunkline Gas Company is authorized to extend the casing of their pipelines across U. S. Highway Sixty-nine at County expense . . ." (R. 149)

And because of Petitioner's refusal to install casing under the new right of way for Highway 418, the Commissioners' Court adopted an order on May 27, 1957, providing:

> "Hardin County will pay, according to law all legal claims fixed against it, for the casing, lowering and re-location of all pipe lines in existing and proposed Farm-to-Market and State Highway rights-of-way, when not otherwise compensated." (R. 228)

However, Respondent made no effort in either instance to purchase or condemn Petitioner's private easements or any right or interest therein.

In express reliance upon the orders of the Commissioner's Court and the correspondence relating thereto (R. 205-207, 227-230), which set forth Respondent's agreements to reimburse, Petitioner did the casing requested (R. 17, 22). The new highway facilities were then constructed. But notwithstanding its agreements, Respondent refused to pay Petitioner's claims for the cost of casing, and Petitioner filed this suit for breach of contract and for compensation for the taking and damaging of its property in violation of both the United States and Texas Constitutions.

Both parties filed motions for summary judgment (R. 12, 27). The District Court granted Petitioner's motion and rendered judgment for Petitioner (R. 35-36) upon findings of fact and conclusions of law (R. 64-71). The Court of Appeals reversed the District Court's judgment and remanded the cause with directions that judgment be entered for Respondent (R. 244). Petitioner timely filed a petition for rehearing (R. 247), which was overruled on February 27, 1963 (R. 275).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the applicable law of Texas on an important question of Texas law which affects all of the 254 counties of the State traversed by large numbers of pipe lines across which State highways are and will be constructed. The court below held that a Texas county has no legal power to compensate for the casing of pipe lines in private easements under rights of way acquired by the county for State highway construction because same does not come within the statutory authority of the county to acquire such rights of way under Vernon's Ann.Civ.Stats., Articles 6674n and 6674q-4. This construction of the Texas

statutes conflicts with that of the Texas Courts of Civil Appeals and that of the State officials charged with the administration and construction of such laws.

In *McLennan County* v. *Sinclair Pipe Line Company*, 323 S.W.2d 471 (Tex.Civ.App., Waco, 1959, error refused n.r.e.),[1] the county undertook to furnish free of cost to the State, the right of way for State highway construction across the pipe line company's easement. As a part of its acquisition of the right of way for the State, the county requested that the company lower its pipe line which was located in the company's private easement. The company refused until the county agreed that the company's right to compensation would not be lost by its proceeding with the work, and then, when the lowering of the line was completed, the company sued the county for its costs. Thus, the facts in that case are not distinguishable from those presented here.

McLennan County, like Respondent and the court below in this case, relied on *Sinclair Pipe Line Company* v. *Archer County*, 147 F.Supp. 650 (N.D. Tex., 1956), affirmed 245 F.2d 79 (5th Cir., 1957), and asserted that having the pipe line lowered was not within its statutory duty to acquire the right of way. The Court of Civil Appeals in the *McLennan County* case refused to follow the federal courts' holding in the *Archer County*, case, that Archer County had no statutory power to pay for pipe line casing. The Texas court held that the pipe line company was not entitled to compensation in the *Archer County* case only because it had been a volunteer and had waived its rights. There being no waiver in its case, the Court of Civil Appeals then held that McLennan County was required to pay and, therefore, necessarily, had legal power to pay for the lowering of the

[1] For the convenience of the Court, the pertinent portions of this decision are quoted in Appendix C, *infra*, pp. 26-29.

pipe line as a part of the County's acquisition of the highway right of way for the State. As noted, the Texas Supreme Court approved the result of the *McLennan County* case by refusing to review the decision of the Court of Civil Appeals.

Sinclair Pipe Line Company v. *State*, 322 S.W.2d 58 (Tex. Civ.App., Fort Worth, 1959),[2] was a condemnation suit brought by Montague County in the name of the State to compel the pipe line company to lower and case its lines. In that case, also, the Court of Civil Appeals held that the county was required, and so had the legal power, to pay compensation for the pipe line adjustments. And, in the most recent Texas case on this question, *Magnolia Pipe Line Company* v. *City of Tyler*, 348 S.W.2d 537 (Tex.Civ.App., Texarkana, 1961, error refused),[3] the Court of Civil Appeals held that counties and cities in Texas may be required to compensate for adjustments of pipe lines crossed by new streets or highways and, therefore, have power to do so.

These decisions of the Waco, Fort Worth and Texarkana Courts of Civil Appeals were all subsequent to the opinions of the district court and Court of Appeals in *Sinclair Pipe Line Company* v. *Archer County, supra.* Even though the Courts of Civil Appeals are intermediate State appellate courts, the Court of Appeals was obligated to follow their decisions on the question of Texas law presented in this case. *State of California* v. *Taylor*, 353 U.S. 553, 556 (1957); *Fidelity Union Trust Company* v. *Field*, 311 U.S. 169, 177-178 (1940); *Six Companies of California* v. *Joint Highway District No. 13*, 311 U.S. 180, 188 (1940); *West* v. *American Telephone & Telegraph Company*, 311 U.S. 223, 236-237

[2] For the convenience of the Court the pertinent portions of this decision are quoted in Appendix C, *infra*, pp. 29-33.

[3] For the convenience of the Court the pertinent portions of this decision are quoted in Appendix C, *infra*, pp. 33-36.

(1940). Its refusal to follow these Texas decisions was error and places its decision on an important question of Texas law in conflict with the Texas courts.

In addition to disregarding the decisions of the Texas courts, the court below also ignored the long-established construction of the pertinent Texas laws by the State officials charged with the duty on construing and administering them. It is undisputed in the record of this case that the officials of the State Highway Department have construed the matter of compensation for pipe line adjustments to be a part of the acquisition of highway rights of way by the counties (R. 83-87, 101-105, 126-127). Even Respondent's County Judge admitted Respondent was the proper agency to have Petitioner's line cased (R. 181). Moreover, the Attorney General of Texas has consistently held ever since 1940 that a Texas county is authorized and required to compensate for adjustment of pipe lines in private easements which are required to accommodate the construction of highway facilities across existing pipe lines. Opinion No. WW-1090, July 12, 1961; Opinion No. WW-1004, March 6, 1961; Opinion No. WW-125, May 22, 1957; Opinion No. O-2405-A, October 9, 1940.[4]

Under the decisions of this Court and the Texas courts, the Court of Appeals was required not to ignore but to give great weight and respectful consideration to the construction of the Texas laws by the Highway Department and the Attorney General of Texas. *Driscoll* v. *Edison Light & Power Company*, 307 U.S. 104, 115 (1939); *Fox* v. *Standard Oil Company of New Jersey*, 294 U.S. 87, 96 (1935); *The Union Insurance Company* v. *Hoge*, 21 How. 35, 66 (1859); *Farrier* v. *Calvert*, 315 S.W.2d 40, 42 (Tex.Civ.App., Austin, 1958, error refused n.r.e.); *Gaynor Const. Co., Inc.* v. *Board of Trustees*, 233 S.W.2d 472, 478 (Tex.Civ.App.,

[4] For the convenience of the Court, all of these Opinions of the Attorney General of Texas are set out in full in Appendix D, *infra*, pp. 37-52.

El Paso, 1950, error refused); *Trinity Portland Cement Co.* v. *State*, 144 S.W.2d 329, 335 (Tex.Civ.App., Beaumont, 1940, error refused).

Further, the Court of Appeals refused to consider Vernon's Ann.Civ.Stats., Article 6674c-1, which expressly provides that a Texas county has the authority to make voluntary contributions to the State Highway Department for the "development" of highways in such county, as well as its authority to acquire rights of way for such highways under Articles 6674n and 6674q-4. Article 6674c-1 contains no restrictions on the use to which a county's funds may be put. So, under this statutue, a county may certainly furnish the necessary funds to the State Highway Department to compensate for pipe line adjustments required for highway construction. And, it has been determined that what may be done indirectly through the Highway Department, may also be done directly by the county or other political subdivision involved. *Clark* v. *Greer*, 232 S.W.2d 876 (Tex. Civ.App., Dallas, 1950). However, the Court of Appeals completely disregarded Article 6674c-1 and the construction thereof by the Dallas Court of Civil Appeals in the *Clark* case, which it was obligated to follow.

The Court of Appeals in this case rested its decision, that Respondent has no power to compensate upon Vernon's Ann.Civ.Stats., Articles 6673 and 6674q-4, and upon the opinion of the federal district court in *Sinclair Pipe Line Company* v. *Archer County, supra.* Article 6673 was first enacted in 1923[5], and re-enacted in its present form in 1925[6]. Insofar as it prohibits the expenditure of county funds for State highways, Article 6673 has been repealed by the 1929 amendment of Vernon's Ann.Civ.Stats., Article 6674n[7], and

[5] Acts 1923, 38th Leg., Ch. 75, Sec. 20, p. 161.

[6] Rev. Stat., 1925, Art. 6673.

[7] Acts 1929, 41st Leg., 3rd C.S., Ch. 10, p. 243.

the enactment in 1932 of Vernon's Ann. Civ. Stats., Article 6674q-4,[8] providing for the acquisition of rights of way by the counties, and by the adoption in 1947 of Vernon's Ann. Civ.Stats., Article 6674c-1,[9] providing for county contributions for highway development. Insofar as Article 6674q-4 limited the expenditure of county funds to the acquisition of rights of way, it also, of course, was repealed by Article 6674c-1.

In *Sinclair Pipe Line Company* v. *Archer County, supra,* which was decided before any Texas court had written on the question of compensation for pipe line adjustments, the district court relied upon the same statutes cited by the Court of Appeals in this case, and it is clear that neither the district court in that case nor the Court of Appeals in this case correctly followed the legislative history of the statutes they cited. In any event, after the decision of the *Archer County* case, the Texas courts decided the questions here presented to the contrary,[10] and the Highway Department officials[11] and the Attorney General of Texas[12] continued to construe the laws as authorizing and requiring Texas counties to pay compensation for pipe line adjustments such as those involved here.

The Court of Appeals in this case has simply followed its decision in *Sinclair Pipe Line Company* v. *Archer County, supra.* In adhering to the *Archer County* decision, the Court of Appeals has completely ignored the intervening decisions of the Texas courts, their construction of the

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[8] Acts 1932, 42nd Leg., 3rd C.S., Ch. 13, Sec. 14, p. 17.

[9] Acts 1947, 50th Leg., Ch. 18, p. 25.

[10] *Magnolia Pipe Line Company* v. *City of Tyler, supra; McLennan County* v. *Sinclair Pipe Line Company, supra; Sinclair Pipe Line Company* v. *State, supra* (Appendix C, *infra,* pp. 26-36).

[11] R. 83-87, 101-107, 126-127.

[12] Opinion No. WW-1090, July 12, 1961; Opinion No. WW-1004, March 6, 1961; Opinion No. WW-125, May 22, 1957; all of which are set out in Appendix D, *infra,* pp. 37-52.

applicable State laws, and the application of such laws by responsible State officials. Its decision stands in direct conflict with Texas Law. Accordingly, it is submitted that the writ of certiorari herein prayed should be granted. Whether a county has power to pay for adjustments of pipe line and utility facilities in private easements, when the adjustments are required for new State highway construction, is a vitally important question to all 254 counties of the State, to the State Highway Department, and to the pipe line and utility companies. This is obvious and requires no argument. The question will arise in virtually every instance of new highway construction in Texas.

2. The decision of the Court of Appeals conflicts in principle with the decision of this Court in Panhandle Eastern Pipe Line Company v. State Highway Commission of Kansas, 294 U.S. 613 (1935), and with the decision of the Court of Appeals for the Seventh Circuit in Buckeye Pipe Line Company v. Keating, 229 F. 2d 795 (7th Cir., 1956), cert. den. 352 U.S. 830, as well as those of the Texas courts.

The Court of Appeals held that Respondent's actions, in securing the casing of Petitioner's pipe line under the portions of Petitioner's private easements crossed by the new highway facilities, did not constitute part of Respondent's acquisition of new rights of way. Essential to this holding was a determination that there was no taking or acquisition by Respondent of the pipe line easements which Petitioner had previously purchased from the fee owners of the land. For, as Respondent correctly conceded in its brief in the court below:

> *"Taking and acquisition of right-of-way are synonymous."*

Respondent then contended that there was no taking of Petitioner's easements and therefore no acquisition for

which Respondent had authority to pay. The Court of Appeals necessarily adopted this contention, and in so doing, it placed its decision in conflict with those of this Court and the Seventh Circuit.

In *Panhandle Eastern Pipe Line Company* v. *State Highway Commission of Kansas, supra*, the material facts of which are not distinguishable from those in this case, this Court held (294 U.S. at p. 618):

> "If carried into effect, the challenged order of the Commission would result in *taking* private property for public use. [Citing cases.] *A private right of way is an easement and is land.* [Citing cases.] No compensation was provided for; none was intended to be made. Ordinarily, at least, such *taking* is inhibited by the Fourteenth Amendment." (Emphasis supplied.)

In *Buckeye Pipe Line Company* v. *Keating, supra*, also decided upon similar facts, the Court of Appeals for the Seventh Circuit followed the *Panhandle* case, *supra*, and held (229 F.2d at p. 798):

> "An *easement* is an interest in real property. It is expressed not in terms of possession or occupancy but in terms of use. Therefore, *the property of the owner of an easement is taken from him* not necessarily when the adverse party occupies the land, but only when he prevents or interferes with the owner's use of the easement. *When that occurs there has been a taking of property from the owner of the easement just as much as if an adverse party had taken real estate which another owned in fee.*" (Emphasis supplied).

Accordingly, the conflict between the decision below and both the *Panhandle* case, *supra*, and the *Buckeye* case, *supra*, is direct and clear.

Moreover, the Texas Courts of Civil Appeals have uniformly followed the *Panhandle* case, *supra*, and the *Buck-*

eye case, *supra*, and have held a requirement that a pipe line in a private easement be cased constitutes a taking of the easement. *Magnolia Pipe Line Company* v. *City of Tyler*, *supra*; *McLennan County* v. *Sinclair Pipe Line Company*, *supra*; *Sinclair Pipe Line Company* v. *State*, *supra* (Appendix C, *infra*, pp. 26-36). Consequently, the decision of the Court of Appeals conflicts with the laws of Texas on the second question presented as well as the first.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 22, 1963

PROOF OF SERVICE

The undersigned counsel for Petitioner, Trunkline Gas Company, a member of the Bar of the Supreme Court of the United States, certifies that a copy of the foregoing petition has been served upon Respondent, Hardin County, by depositing same in the United States mail, with first class postage prepaid, addressed to Messrs. Sears and Burns and Mr. Robert L. Burns, 1811 C & I Life Building, Houston 2, Texas, attorneys of record for Respondent, this 22nd day of May, 1963.

.....

Cecil N. Cook
Counsel for Petitioner

APPENDIX A

Opinion and Judgment of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19592

HARDIN COUNTY,

Appellant,

versus

TRUNKLINE GAS COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

(January 9, 1963)

Before HUTCHESON, WISDOM and GEWIN, Circuit Judges.

HUTCHESON, Circuit Judge: Alleging both a taking and a damaging under the Texas and Federal Constitutions and breach of a written contract, Trunkline Gas Company, a Delaware Corporation, Appellee, brought suit against Hardin County, a political subdivision of the State of Texas, appellant, to recover the cost of extending the casing enclosing its pipelines crossing two state highways of the State of Texas into adjoining land acquired by appellant for the State of Texas for widening the highways.

Motions for summary judgment were filed by both parties, and the district court, on full findings of fact and conclusions of law, granted the motion of appellee and denied appellant's motion.

Here citing many cases, with particular emphasis on this court's opinion in *Sinclair Pipeline Co.* v. *Archer County*, 245 F (2) 79, appellant insists that the judgment was wrong and must be reversed. We agree that this is so for the reasons hereinafter briefly stated and the authorities hereinafter cited.

Basic Texas law dictates that in the absence of a statute authorizing some other agency to contract, the authority to contract on behalf of a county is vested in the Commissioners' Court. *Anderson* v. *Wood*, 152 SW (2) 1084. The contractual authority of a Commissioner's Court is very limited and its limited nature is well stated in *Canales* v. *Laughlin*, 214 SW (2) 451, as follows:

> "The Constitution does not confer on the commissioners courts 'general authority over the county business' and such courts can exercise only such powers as the Constitution itself or the statutes have 'specifically conferred upon them'. See Mills County v. Lampasas County, 90 Tex. 603, 40 SW 403; Anderson v. Wood, 137 Tex. 201, 152 SW (2) 1084. While the commissioners courts have a broad discretion in exercising powers expressly conferred on them, nevertheless the legal basis for any action by any such court must be ultimately found in the Constitution of [sic] the statutes."

Thus, if neither the Constitution nor statutes empower a Commissioners Court to make a particular contract, the contract is null and void. *Nunn-Warren Publishing Co.* v.

Hutchinson County, 45 SW (2) 651; *Aldrich* v. *Dallas County*, 167 SW (2) 560; *Baldwin* v. *Travis County*, 83 SW 480; and *Dodson* v. *City of Del Rio*, 172 SW (2) 125.

Review of the Texas statutes relating to State highways manifests that a Texas county not only is not authorized to contract to improve, construct or reconstruct a State highway, but is expressly prohibited from expending county funds therefor. The statutes and authorities also prove that the authority of a county is limited to acquiring right-of-way for a State highway.

Prior to the creation of the Texas Highway Department, the power to acquire right-of-way for (by purchase or condemnation), and to construct, improve and reconstruct roads and highways outside of cities was vested exclusively in counties. The basic legislation creating the Texas Highway Department and defining its powers was enacted in 1917, 1923 and 1925. Acts. 1917, 35th Leg., p. 416, Ch. 190; Acts 1923, 38th Leg., p. 155, Ch. 75; Acts 1923, 38th Leg., 2nd C. S., p. 71; Acts 1925, 39th Leg., Ch. 186, p. 458. As thereafter supplemented from time to time, this legislation is found in Articles 6663 to 6674q-14 Vernon's Annotated Civil Statutes.

The Texas decisions, *Robbins* v. *Limestone County*, 268 S.W. 915 (Tex. Sup. 1925); *Nairin* v. *Bean*, 48 SW (2) 584; *Heathman* v. *Singletary*, 12 SW (2) 151; *Gabbert* v. *City of Brownwood*, 176 SW (2) 344; and *State Highway Commission* v. *Humphreys*, 58 SW (2) 144; have held uniformly that these statutes:

(1) require the Department to take over and maintain the State highways;

(2) vested exclusive control of State highways in the Highway Department;

(3) vested exclusive power to improve, construct and reconstruct State highways in the Highway Department;

(4) divested counties of the power to acquire right-of-way for State highways (until 1929); and

(5) operated to transfer the former jurisdiction of counties over State highways to the State Highway Commission.

The language of the statutes admits of no other construction.

Administration of the State Highway Department is vested in the Highway Commission, Article 6663; the Commission is charged with the duty to "formulate plans and policies for the location, construction and maintenance of a comprehensive system of state highways and public roads", Art. 6665; to establish and make public proclamation of all rules and regulations for the conduct of the work of the Department, Art. 6666; and to "investigate and determine the methods of road construction best adapted to the different sections of the state, and [to] "establish standards for the construction and maintenance of highways . . .", Article 6667.

Article 6673 authorizes the Commission

> "To take over and maintain the various state highways in Texas, and the counties through which said highways pass shall be free from any cost, expense or supervision of such highways."

This complete delegation of power over state highways to the Department and prohibition of expenditure of county funds for improvement or construction thereof is repeated in Article 6774q-4 as follows:

> "All further improvement of said State Highway System shall be made under the exclusive and

> direct control of the State Highway Department and with appropriations made by the Legislature out of the State Highway Fund. Surveys, plans and specifications and estimates for all further construction and improvements of said system shall be made, prepared and paid for by the State Highway Department. No further improvement of said system shall be made with the aid of or with any moneys furnished by the counties except the acquisition of right-of-ways which may be furnished by the counties, their subdivisions or defined road districts."

The appellee, recognizing the force and effect of the Sinclair case in this court, undertakes to distinguish it on the ground that in that case there was no agreement to pay on the part of the county, while in this case there was. In so contending, we think the appellee completely fails to appreciate the force and effect of the Texas statutes and decisions cited in and made the basis of the decision of the district court in the Sinclair case,[1] that the county was not obligated, indeed could not legally obligate itself, to pay the sum sued for.

It will be noted that the agreement on which plaintiff sued provided not that Hardin County will pay for the casing, lowering, etc., but that it will pay according to law all legal claims affixed against it, and that, for the reasons shown in the Sinclair and other cases, the claim asserted by plaintiff against the county was not, as it was not in Sinclair's case, a legal claim.

Thus the burden on plaintiff in this case is, as it was in Sinclair's case, to establish the legality of the claim and this, as in Sinclair's case, plaintiff was not able to do.

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[1] Sinclair Pipeline Co. v. Archer County, 147 F. Supp. 650; Affirmed, 245 F (2) 79.

The judgment is therefore Reversed and the cause Remanded with directions to enter judgment for the appellant.

REVERSED and REMANDED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

By /s/ CLARA R. JAMES
Deputy

New Orleans, Louisiana

APR 18 1963

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 19,592

D. C. Docket No. 3851 Civil
HARDIN COUNTY,

Appellant,

versus

TRUNKLINE GAS COMPANY

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

Before Hutcheson, Wisdom and Gewin, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment for the appellant;

It is further ordered and adjudged that the appellee, Trunkline Gas Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

January 9, 1963

Issued as Mandate: MAR 20 1963

Recoverable Costs:

Docketing Cause, Etc. $25.00

APPENDIX B

Statutes

Vernon's Ann.Civ.Stats., Article 6673 (Revised Civil Statutes of Texas of 1925, Vol. II, p. 1900, Art. 6673), is as follows:

> "The Commission is authorized to take over and maintain the various State Highways in Texas, and the counties through which said highways pass shall be free from any cost, expense or supervision of such highways. The Commission shall use the automobile registration fees in the State Highway Fund for the maintenance of such highways, and shall divert the same to no other use unless the Commission shall be without sufficient funds from other sources to meet Federal aid to roads in Texas, and in such case the Commission is authorized by resolution to transfer a sufficient amount from such fund to match said Federal aid. Acts 1923, p. 161; Acts 2nd C.S. 1923, p. 71."

Vernon's Ann.Civ.Stats., Article 6674c-1 (Texas Acts 1947, 50th Leg., Ch. 18, p. 25), is as follows:

> "Any county or political sub-division of any county in this state, acting through its governing agency, may make, and the State Highway Commission, in its discretion, may accept, voluntary contributions of available funds from such county or political sub-division, for expenditure by the State Highway Commission in the development of the public roads of such county, or political sub-division. Acts 1947, 50th Leg., p. 25, ch. 18, § 1."

Vernon's Ann.Civ.Stat., Article 6674n (Texas Acts 1955, 54th Leg., Ch. 423, p. 1128), is as follows:

> "Whenever, in the judgment of the State Highway Commission, the use or acquisition of any land for road, right of way purposes, timber, earth, stone, gravel or

other material is necessary or convenient to any road to be constructed, reconstructed, maintained, widened, straightened or lengthened, or land not exceeding one hundred (100) feet in width for stream bed diversion in connection with the locating, relocating or construction of a designated State Highway by the State Highway Commission, the same may be acquired by purchase or condemnation by the County Commissioners Court. This authority includes the power to exercise the right of eminent domain by any County Commissioners Court within the boundaries of a municipality with the prior consent of the governing body of such municipality. Provided that the county in which the State highway is located may pay for same out of the County Road and Bridge Fund, or any available county funds.

"Any Commissioners Court is hereby authorized to secure by purchase or by condemnation on behalf of the State of Texas, any new or wider right of way or land not exceeding one hundred (100) feet in width for stream bed diversion in connection with the locating, relocating or construction of a designated State Highway, or land or lands for material or borrow pits, to be used in the construction, reconstruction or maintenance of State Highways and to pay for the same out of the County Road and Bridge Fund, or out of any special road funds or any available county funds. This authority includes the power to exercise the right of eminent domain by any County Commissioners Court within the boundaries of a municipality with the prior consent of the governing body of such municipality. The State Highway Commission shall be charged with the duty of furnishing to the County Commissioners Court the plats or field notes of such right of way or land and the description of such materials as may be required, after which the Commissioners Court may, and is hereby authorized to purchase or condemn the same, with title to the State of Texas, in accordance with such field notes. Provided that in the event of condemnation by the County the procedure shall be the same as that set out in Title 52, Articles 3264 to

3271, inclusive, Revised Civil Statutes of Texas, of 1925. Provided that if the County Commissioners Court of any County in which such right of way is, in the judgment of the State Highway Commission, necessary for the construction of a part of a designated State Highway shall fail or refuse to secure by purchase or by condemnation for or on behalf of the State of Texas, such right of way or part thereof, immediately and as speedily as possible, under said Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, of 1925, after being served with a copy of an order of the State Highway Commission identifying by field notes, the part of the Highway necessary for the construction of such designated State Highway and requesting such County Commissioners Court to secure same, then and in such event and within ten (10) days after the service of such notice, said State Highway Commission shall direct the Attorney General of Texas, to institute condemnation proceedings in the name of the State of Texas, for the purpose of securing such right of way. Such condemnation proceedings shall be instituted by the County or District Attorney of the County in which the land is situated and the venue of such proceedings shall be in the county in which the land is situated and jurisdiction and authority to appoint three (3) disinterested freeholders of such County as Commissioners is hereby conferred upon the County Judge of such County in which the land is situated and otherwise such condemnation shall be according to the provisions of said Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, 1925, as amended. Acts 1925, 39th Leg., ch. 186, p. 458, § 14; Acts 1929, 31st Leg., 32d C.S. p. 243, ch. 10; Acts 1930, 41st Leg., 5th C.S., p. 243, ch. 79; Acts 1933, 43rd Leg., p. 622, ch. 207; Acts 1935, 44th Leg., p. 485, ch. 199, § 1; Acts 1955, 54th Leg., p. 1128, ch. 423, § 1."

Vernon's Ann.Civ.Stats., Article 6674q-4 (Texas Acts 1943, 48th Leg., ch. 324, Sec. 3, p. 496), is as follows:

"All further improvements of said State Highway System shall be made under the exclusive and direct control of the State Highway Department and with appropriations made by the Legislature out of the State Highway Fund. Surveys, plans and specifications and estimates for all further construction and improvement of said system shall be made, prepared and paid for by the State Highway Department. No further improvement of said system shall be made with the aid of or with any moneys furnished by the counties except the acquisition of right-of-ways which may be furnished by the counties, their subdivisions or defined road districts. But this shall in nowise affect the carrying out of any binding contracts now existing between the State Highway Department and the Commissioners Court of any county, for such county, or for any defined road district. In the development of the System of State Highways and the maintenance thereof, the State Highway Commission shall from funds available to the State Highway Department, provide:

"(a) For the efficient maintenance of all highways comprising the State system.

"(b) For the construction, in co-operation with the Federal Government to the extent of Federal Aid to the state, of highways of durable type of the greatest public necessity.

"(c) For the construction of highways, perfecting and extending a correlated system of State Highways, independently from state funds. Acts 1932, 42nd Leg., 3rd C.S., p. 15, ch. 13, § 3, (formerly § 4), renumbered and amended Acts 1939, 46th Leg., p. 582, § 1; Acts 1941, 47th Leg., 1st C.S., p. 2, ch. 2, § 1; Acts 1943, 48th Leg., p. 494, ch. 324, § 1."

APPENDIX C

Conflicting Texas Decisions

McLennan County v. Sinclair Pipe Line Company, 323 S.W. 2d 471, 472-474 (Tex. Civ. App., Waco, 1959, error refused n.r.e.)

"This is a suit by Sinclair Pipe Line Company against McLennan County to recover from McLennan County the cost of lowering its pipeline at the request of the Commissioners Court of McLennan County in order that Farm to Market Road 1860 might be constructed across the pipeline as it lay on the W. F. Neale farm in McLennan County, Texas. The Trial Court granted judgment for Sinclair Pipe Line Company on its motion for summary judgment.

"McLennan County appeals, contending:

(1) The Trial Court erred because, under the facts, there is *no statutory duty,* contractual obligation, tort obligation, nor *other legal obligation* on McLennan County to pay Sinclair anything."[13]

• • •

"We revert to McLennan County's 1st contention. The facts are undisputed, and reflect that in 1947 Sinclair acquired a right of way easement from Neale for its pipeline to cross his farm in McLennan County, and built its pipeline on such easement. In 1954 the Texas Highway Department called on McLennan County to furnish 'the required right of way' for Farm to Market Road 1860. McLennan County, in 1956, by order of the Commissioners Court, agreed 'to furnish all required right of way free of cost to the State' for such road. Later in 1956 McLennan County notified Sinclair that the proposed road was to cross Sinclair's ease-

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[13] Emphasis has been supplied in the appendix by the writer of the Petition except where the contrary is expressly noted.

ment and pipeline as it lay on the Neale farm in McLennan County. McLennan County requested that Sinclair lower its pipeline in order that this new section of road might be constructed. Sinclair refused to lower its pipeline until McLennan County should agree to pay compensation and continued to refuse to lower the pipeline under these conditions until 27 June 1956. On that date the Commissioners Court of McLennan County passed an order stating that if Sinclair would go ahead and lower its pipeline that such action would not in any way prejudice any claim Sinclair might have in the future resulting from such lowering. Sinclair lowered its pipeline and made claim for the cost of lowering same, which claim was rejected by the Commissioners Court of McLennan County. The portion of Farm to Market Road 1860 which crossed Sinclair's pipeline was new construction and not merely improvement of an existing road.

"Sinclair based its claim for compensation for the cost of relocating its pipeline on Article I, Sec. 17 of the Texas Constitution, Vernon's Ann. St., which provides:

> 'No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person * * *.'

Sinclair's pipeline easement is property in the Constitutional sense. 12 Am. Jur. p. 787, Sec. 157. An easement is an interest in land for which the owner is entitled to compensation as much so as if the land to which the easement is appurtenant were taken. 29 C.J.S. Eminent Domain § 105, p. 910; Panhandle Eastern Pipe Line Co. v. State Highway Comm. of Kansas, 294 U.S. 613, 55 S.Ct. 563, 79 L.Ed. 1090; Buckeye Pipe Line Co. v. Keating, 7 Cir., 229 F.2d 795; Forest Lawn Lot Owners Ass'n v. State, Tex. Civ. App., 248

S.W. 2d 793; City of LaGrange v. Pieratt, 142 Tex. 23, 175 S.W. 2d 243.

"Sinclair Pipe Line Company has a property right in its easement that it had obtained over the Neale farm. McLennan County not only requested Sinclair to lower its pipeline but pursued that request until Sinclair agreed to lower its pipe. Sinclair refused to lower its pipe until it was reimbursed, and maintained such position until it was assured by an order of the Commissioners Court that such lowering would not in any way prejudice its right to proceed with claim against the County.

"*McLennan County relies on the case of Sinclair Pipe Line Co.* v. *Archer County, D.C., 147 F. Supp. 650, affirmed 5 Cir., 245 F. 2d 79.* This was a case in which Archer County agreed to furnish the right of way for a state road project, which crossed a Sinclair pipeline. In that case Sinclair lowered its pipeline on its own volition, without even having been required or requested to do so by the County. In that case the 5th Circuit Court, in affirming a judgment for Archer County denying Sinclair compensation for lowering its pipeline, held that where the county had not condemned the pipeline easement *or requested removal of the pipeline,*[14] the company could not recover expenses incurred in relocation of lines.

"The Archer County case holds that an easement is property; that Sinclair's easement was in that case taken; and that Sinclair is entitled to reimbursement from the proper source for such expenditure. Recovery by Sinclair against Archer County was denied by reason of the fact that Archer County had not condemned the pipeline easements or requested removal of the pipeline."

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[14] Emphasis the court's.

"Here McLennan County undertook to furnish *all*[15] the right of way for the construction of Farm to Market Road 1860. This was new construction at the point in issue. Sinclair had an easement for its pipeline which the road had to cross. Such easement is property. McLennan County requested Sinclair to remove the pipeline, Sinclair refused (but later assented when McLennan County agreed that no rights would be lost by Sinclair in doing so). Sinclair's property was to all intents and purposes taken and Sinclair is entitled to compensation therefor. The Archer County case is not contrary to the foregoing but acutally supports the result herein reached. Sinclair Pipe Line Co. v. State, Tex. Civ. App. Ft. Worth, 322 S.W. 2d 58 is an analogous case and supports our conclusions herein. McLennan County's contention is overruled."

• • •

"The judgment of the Trial Court is affirmed."

Sinclair Pipe Line Company v. State, 322 S.W. 2d 58, 59-61 (Tex. Civ. App., Fort Worth, 1959).

"In 1918 appellant's easement was acquired by private grants, on which it constructed its pipe lines and had operated them for 38 years when appellee, in 1956, secured from the landowners highway rights of way easements which crossed appellant's pipe line easement at two places. The parties failed to reach an agreement as to what compensation appellant was entitled to receive; and prior to the beginning of the construction work by appellee, under an agreement that condemnation proceedings would be instituted by appellee for the purpose of determining the amount of compensation appellant should be awarded, appellant made the necessary alterations and

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[15] Emphasis the court's.

adjustments in its pipe lines to accommodate and facilitate the road construction. This work consisted of lowering, encasing, and venting the pipe lines, in conformity with a regulation promulgated by the Highway Department on May 10, 1956. It was stipulated that the reasonable cost expended by appellant in this work was the sum of $3,907.19. It was also stipulated that benefits to appellant, if any, were limited to the correction of conditions which would not have existed but for the construction and improvement of the roads over the pipe lines. Appellant sought only the cost of making the alterations in the portions of its pipe lines embraced in and under the newly acquired road rights of way.

"Appellant concedes that appellee had the right to condemn appellant's easement, but *insists that appellee has the constitutional and statutory obligation to make just compensation.* Appellee contends that denial of compensation was proper on the ground that the alterations made by appellant were required by law and by the rules and regulations of the Highway Commission and by the Highway Department; that appellee took whatever it did take, under its police power and not under its powers of eminent domain; *that appellant's expense was operational* and its denial was not in violation of the Fourteenth Amendment to the United States Constitution or Article 1, sec. 17, of the Texas Constitution, Vernon's Ann. St.; *that appellant's pipe lines were not taken or destroyed,* and appellee could not, in condemnation proceedings, require appellant to lower and adjust them; and that there was no evidence of the value of that part of appellant's easement which was condemned.

"Appellee's contentions are interesting and have been ably presented, but we are nevertheless of the opinion that this suit was brought under the condemnation statute and

is governed by the same constitutional and statutory provisions which are applicable to other condemnation suits in this State.

"That this is such a suit is shown by appellee's pleadings in the case. It sought and obtained a judgment condemning appellant's property for right of way purposes. It was stipulated that condemnation proceedings were properly before the trial court. Appellee's brief on this appeal affirms that 'This case is one wherein the State of Texas, *acting by and through the Commissioners' Court of Montague County,* Texas, under its power of eminent domain, brought suit to acquire an easement right of way over, upon and across Sinclair Pipe Line Company's pipeline easements and pipe lines * * * for the purpose of constructing and maintaining Farm to Market Roads * * *. Condemnation proceedings were filed, and on September 23, 1957, after hearing the evidence submitted by both parties, the Commissioners denied Appellant any recovery of damages by reason of the condemnation of Appellant's pipe line easements * * *. Upon the trial of the case before the County Court, without a jury, upon an agreed statement of facts, judgment was rendered granting Appellee highway rights of way easements over, upon and across Appellant's pipe line easements * * * and the Court * * * denied Appellant any damages by reason of its pipe line rights of way easements being condemned * * *.'

"The Fourteenth Amendment to the United States Constitution prevents appellee from taking property without due process of law. Article 1, sec. 17, of our State Constitution prevents appellee from taking, damaging, or destroying for or applying to public use any property without adequate compensation being made.

"Appellant's *easement* is property in the constitutional sense. 18 Am. Jur., p. 787, sec. 157. 'An easement is an interest in land for which the owner is entitled to compensation, as much so as if the land to which the easement is appurtenant were taken or injured.' 29 C.J.S. Eminent Domain § 105, p. 910." • • •

"Appellee acquired rights of way easements from the owner of the fee, from whom appellant had previously acquired its easements. Appellee acquired no more rights than the owners retained when they conveyed the easements to appellant. These owners could not convey to appellee what they had already conveyed to appellant." • • •

"Arguments in analogous cases that the taking or damaging was in the exercise of police power were considered and rejected in . . . Panhandle Eastern Pipe Line Co. v. State Highway Commission (Kan.), 294 U.S. 613, 55 S. Ct. 563, 79 L. Ed. 1090; Buckeye Pipe Line Company v. Keating, 7 Cir., 229 F. 2d 795;" • • •

"*An easement is taken* when the condemnor interferes with its owner's use. Buckeye Pipe Line Company v. Keating, supra. Appellant asks no more than the cost of the alterations to accommodate the road construction.

• • •

"In Panhandle Eastern Pipe Line Co. v. State Highway Commission (Kan.), supra, it was held that legislation requiring the pipe line company, at its own expense, to make alterations in its line to accommodate proposed highway construction, would result in taking private property without compensation, and was inhibited by the Fourteenth Amendment to the Federal Constitution."

• • •

"Having made the alterations in advance of appellee's construction work on appellee's promise to file a condemna-

tion suit in order that appellant's damages might be ascertained, we think appellant is entitled to recover its minimum damage."

• • •

"The judgment is reversed and judgment rendered for appellant."

Magnolia Pipe Line Company v. City of Tyler, 348 S.W. 2d 537, 539, 540-541, 543 (Tex. Civ. App., Texarkana, 1961, error refused).

"Magnolia in the trial court contended among other things that its easement rights were superior to the reserved rights of the grantors, that the acts of the City in uncovering the pipe line on one street and attempting to pave very near to the line on another street, and *taking a portion of its pipe line right-of-way, thereby interfering with its enjoyment of its easement* privileges by the construction of new street paving, would constitute a taking of Magnolia's property without due process of law, and would violate its constitutional rights under both the Texas and Federal constitutions. It was Magnolia's contention therefore that the City was due to pay to Magnolia the agreed reasonable costs for lowering and encasing the pipe line. Magnolia further denied the claims of the City that it was acting in the proper exercise of its police power."

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"The trial court found in its findings of fact that it was necessary to lower and encase the pipe line at both streets, and further found to the effect that unless Magnolia's pipe line was lowered and encased that same would be the cause of serious danger to the public and held to the effect that Magnolia's use thereof was subject to reasonable regulation by the City, and that it was a valid exercise of the police power by the City to cause Magnolia to lower and encase

its high pressure pipe oil line where crossed by the city streets in question, at Magnolia's cost and expense, in order to meet the needs of the public for safe travel and transportation. The trial court rendered judgment against Magnolia on its cross-action to recover from the City the amount of the costs agreed upon as reasonable, and being the sum of $3,630.98. Magnolia has appealed."

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"Art. 1, Sec. 17, of our State Constitution, Vernon's Ann. St., prevents the taking, damaging, or destroying for or applying to public use any property without adequate compensation being made, unless consented to by the owner of such property. Also the Fourteenth Amendment to the United States Constitution prevent the taking of a person's property without due process of law.

"Magnolia's pipe line *easement* is property in the constitutional sense 12 Am. Jur. p. 787, Sec. 157.

"An easement is an interest in land for which the owner is entitled to compensation as much so as if the land to which the easement is appurtenant were taken. 29 C.J.C. Eminent Domain § 105, p. 910; McLennan County v. Sinclair Pipe Line Company, Tex. Civ. App., 323 S.W. 2d 471, wr. ref., n.r.e.; Panhandle Eastern Pipe Line Co. v. State Highway Comm. of Kansas, 294 U.S. 613, 55 S. Ct. 563, 79 L. Ed. 1090; Buckeye Pipe Line Co. v. Keating, 7 Cir., 229 F. 2d 795;" • • •

"Magnolia had a property right in its two easements it had obtained from Nichols and Thedford. The City of Tyler requested and demanded that Magnolia lower and encase its pipe line. Magnolia refused to lower and encase the pipe line at its own cost and expense, and maintained such position until the written agreement was entered into heretofore referred to, wherein it was clearly set forth that

the lowering and encasing of such pipe lines under the streets in question would not in any way prejudice Magnolia's right to seek reimbursement for the costs thereof from the City. Thus it is clear that Magnolia was not a 'volunteer' in lowering and encasing its pipe line at the streets in question.

"In McLennan County v. Sinclair Pipe Line Company, surpa, Tex. Civ. App., 323 S.W. 2d 471, 474, wr. ref., n.r.e., a somewhat analogous case to the case at bar, Sinclair (who protested and was not a volunteer) was allowed to recover from McLennan County the expense of lowering and encasing its pipe line at points where a *new*[16] road was placed over it by McLennan County. We quote briefly from the Court's opinion in said case as follows:

> 'Here McLennan County undertook to furnish all the right of way for the construction of Farm to Market Road 1860. This was new construction at the point in issue. Sinclair had an easement for its pipeline which the road had to cross. Such easement is property. McLennan County requested Sinclair to remove the pipeline, Sinclair refused (but later assented when McLennan County agreed that no right would be lost by Sinclair in doing so). Sinclair's property was to all intents and purposes taken and Sinclair is entitled to compensation therefor. The Archer County case is not contrary to the foregoing but actually supports the result herein reached. Sinclair Pipe Line Co. v. State., Tex. Civ. App., Ft. Worth, 322 S.W. 2d 58 is an analogous case and supports our conclusions herein. McLennan County's list contention is overruled.'

"Sinclair Pipe Line Company v. State of Texas, Tex. Civ. App., 322 S.W. 2d 58, 60, no writ history, is also a somewhat analogous case to the case at bar, and holds

[16] Emphasis the court's.

that where the State of Texas acquired highway rights from owners of the fee crossing over and invading easements which such owners had previously granted to Sinclair Pipe Line Company for a private pipe line, that the State invaded the pipe line company's easement by requiring it to change locations of pipes in connection with construction and improvement of roads, and such taking or damaging was not in the valid exercise of the police power, and that the pipe line company was entitled to receive as a minimum the cost of alterations and adjustments made in the pipe lines to accommodate and facilitate the road construction." • • •

"While undoubtedly the police power of a city is vast, as outlined by the cases cited by appellee in its excellent brief, it is also clear that such power must be *validly exercised*.[17] Since the *pipe line easements* were never dangerous to the public until the same were invaded by the City, and the dangerous conditions were proximately caused by the invasion of such easements by the City, we hold that the City under such circumstances *could not* in the guise of its police power *take or damage Magnolia's easements* without paying Magnolia adequate compensation therefor under Art. 1, Sec. 17, of our State Constitution, and under the Fourteenth Amendment of the United States Constitution.

"Appellant's points are sustained. The judgment of the trial court is reversed and judgment is here rendered for Appellant Magnolia for the sum of $3,630.98 against appellee City of Tyler.

"Reversed and rendered."

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[17] Emphasis the court's.

APPENDIX D

Conflicting Opinions of the Attorney General of Texas

[SEAL]

THE ATTORNEY GENERAL
OF TEXAS

Austin 11, Texas

WILL WILSON
Attorney General

July 12, 1961

Miss Edna Cisneros
County Attorney
Willacy County
Raymondville, Texas

Opinion No. WW-1090
Re: Whether the Commissioner's Court, without paying compensation therefor, can require a gas pipeline company to encase in metal and vent its pipeline under the facts stated.

Dear Miss Cisneros:

You have requested the opinion of this office on the following question:

> "May the Commissioner's Court, without paying compensation therefor, require a gas pipeline company to incase in metal and vent its pipeline under and across a road which is to be paved, not only across the right-of-way of such road in existence at the time such pipeline was laid, but in addition, to incase in metal and vent such pipeline lying across and under the contiguous right-of-way thereafter acquired by the County for the purpose of widening such road?"

As we understand your question and the factual situation which prompted its submission, the pipeline in question, at the time it was laid, crossed beneath an existing roadway which is under the jurisdiction of the Commissioner's Court

of Willacy County and sometime thereafter the Commissioner's Court acquired additional right-of-way for the purpose of widening and improving the existing roadway. The contemplated improvement of the roadway requires that the pipeline be enclosed in metal casing and vented.

The situation raised by the facts presented requires that we consider the pipeline that must be encased and vented in two distinct categories, to wit: (1) that portion under the existing roadway and (2) that portion under the additional right-of-way which was acquired after the pipeline was in place.

Having placed its transmission lines under the existing roadway subsequent to the effective date of Article 1436b of Vernon's Civil Statutes, the pipeline company in question is subject to the provisions and requirements of this Article, which provides in part as follows:

> "... The public agency having jurisdiction or control of a highway or county road, that is, the Highway Commission or the Commissioners Court, as the case may be, may require any such person, firm or corporation or incorporated city or town at its own expense to relocate its pipes, mains, conductors or other fixtures for conducting gas on a state highway or county road outside the limits of an incorporated city or incorporated town so as to permit the widening or changing of traffic lanes, by giving thirty (30) days written notice to such person, firm or corporation or incorporated city or town and specifying the facility or facilities to be moved and indicating the place on the new right-of-way where such facility or facilities may be placed. Such person, firm or corporation or incorporated city or town shall replace the grade and surface of such road or highway at its own expense."

Consequently, it is our opinion that the portion of the pipeline which passes under the roadway as it existed prior to the acquisition of the additional right-of-way is governed

by our holding in WW-961 (November 18, 1960) and the language therein quoted from *State* v. *City of Austin,* ..... Tex. ....., 331 S.W. 2d 737 (1960) and you are hereby advised that the pipeline company can be required to encase and vent this portion of its pipeline at its own expense and without compensation from the county.

The remaining portion of the pipeline affected by the planned improvement and widening program, i.e., that portion passing under the additional right-of-way acquired by the county in order to effectuate the widening and improvement of the roadway, presents a different question.

As your request indicates, the pipeline company had acquired an easement for its pipeline under the property adjacent to the existing roadway prior to the time such property was acquired by the county as part of the right-of-way.

Section 17 of Article I of the Constitution of the State of Texas provides that:

> "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; . . ."

Since the existing easement of the pipeline company was not condemned or otherwise acquired by the county at the time the additional right-of-way in which it now lies was acquired, any requirement that this portion of the pipeline be encased and vented would be a taking of the pipeline company's easement and is prohibited by Section 17 of Article I of the Constitution of the State of Texas unless adequate compensation is paid to the pipeline company. See WW-125 (May 22, 1957) and WW-1004 (March 6, 1961).

Therefore, you are advised, that in our opinion the pipeline company in question cannot be required to encase and

vent that portion of its pipeline which lies within a prior easement under the property acquired by the county for roadway improvement and widening purposes without compensating the pipeline company therefor.

SUMMARY

The Commissioner's Court is authorized to require a pipeline company to encase and vent that portion of its pipeline which crosses under an existing roadway at the pipeline company's own expense and without reimbursement, but the Commissioner's Court cannot require the pipeline company to encase and vent that portion of its pipeline which lies in a pre-existing easement under property acquired for the improvement of such roadway without compensating the pipeline company therefor.

Yours very truly,

WILL WILSON
Attorney General of Texas

By /s/ W. O. Shultz
W. O. Shultz
Assistant

WOS:mm

APPROVED:

OPINION COMMITTEE
W. V. Geppert, Chairman

John Reeves
John Leonarz
Linward Shivers
Marvin F. Sentell

REVIEWED FOR THE ATTORNEY GENERAL

BY: Morgan Nesbitt

[SEAL]

THE ATTORNEY GENERAL
OF TEXAS

Austin 11, Texas

WILL WILSON
Attorney General

March 6, 1961

Mr. Ellis A. Oualline, Jr.
County Attorney of Montgomery County
Conroe, Texas

Opinion No. WW-1004

Re: Whether Commissioners' Court may require gas pipe line company to move or lower its pipe lines which are now in, along, or across a new right of way location to be purchased for a prospective farm-to-market road.

Dear Mr. Oualline:

Your request for an opinion is in the following language:

"The Commissioner's Court of Montgomery County has requested information that goes beyond your opinion No. WW-961. They are purchasing right-of-way on which the State of Texas will construct a farm-to-market road.

"May the Commissioner's Court of Montgomery County require gas pipe line companies to move or lower their pipe lines along or across this right-of-way for the proposed road without paying them compensation therefor?"

Our holding in Opinion No. WW-961, to which you refer, is reflected in the "Summary" thereof, which we quote:

> "The Commissioners' Court of Sherman County, Texas, is authorized to require gas pipeline companies, whose lines run along or across public roads which are to be paved, to move or lower such pipelines at their own expense and without reimbursement from the State."

That opinion pertains to a pipe line which has been laid in an existing street. Our conclusions were based upon *State* v. *City of Austin*, ... Tex. ..., 331 S.W. 2d 737 (1960), which in turn is predicated upon Section 1 of Article 1436b, V.C.S. We quote the applicable portions of that statute:

> "Section 1. Any person, firm or corporation or incorporated city or town engaged in the business of transporting or distributing gas for public consumption shall have the power to lay and maintain pipes, mains, conductors and other facilities used for conducting gas through, under, along, across and over all public highways, public roads, public streets and alleys, and public waters within this State; provided that within the corporate limits of an incorporated city or incorporated town such right shall be dependent upon the consent and subject to the direction of its governing body.... *The public agency having jurisdiction or control of a highway or county road, that is, the Highway Commission or the Commissioners Court, as the case may be, may require any such person, firm or corporation or incorporated city or town at its own expense to relocated its pipes, mains, conductors or other fixtures for conducting gas on a state highway or county road outside the limits of an incorporated city or incorporated town so as to permit the widening or changing of traffic lines. . . .*" (Emphasis Added)

It is thus seen that pipe line companies may lay their pipe lines in existing highways, roads, streets, etc., but, in

turn, may be required by the governing authority to relocate them so as to permit the widening or changing of traffic lanes.

A different situation exists in your case. Your letter to the Attorney General dated February 4, 1961, supplementing information in your opinion request, makes it plain that the proposed farm-to-market road is on new location and that the pipe line in question is on private property. This being true, there is no statute or law by which the pipe line company can be required to move or lower its pipe lines. Doubtless this pipe line lies within an easement secured by the company from the owner of the land.

Section 17 of Article I of the Constitution of Texas states:

> "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person."

If by negotiation your Commissioners' Court cannot persuade the company to move this pipe line you will have to pay it therefor. If a price cannot be agreed upon you will have to condemn the easement, of which the pipe line is a part. If the Commissioners' Court cannot agree with the owner of the fee on the value of the land then a condemnation suit should be brought jointly naming both the fee owner and the pipe line company as condemnees.

In answer to your question, therefore, it is our opinion, and we so hold, that the Commissioners' Court of Montgomery County may not require a pipe line company to move or lower its pipe lines from the private premises upon which a future road is contemplated.

SUMMARY

The Commissioners' Court may not require a gas pipe line company to move or lower its pipe lines which are now in, along, or across a new right of way location being acquired for a proposed farm-to-market road.

Yours very truly,

WILL WILSON
Attorney General of Texas

By /s/ W. Ray Scruggs
W. Ray Scruggs
Assistant

WRS:vj

APPROVED:

OPINION COMMITTEE
W. V. Geppert, Chairman

Jerry Roberts
Riley Eugene Fletcher
Thomas Burros

REVIEWED FOR THE ATTORNEY GENERAL
By: Morgan Nesbitt

[SEAL]

THE ATTORNEY GENERAL
OF TEXAS

Austin 11, Texas

WILL WILSON
Attorney General

May 22, 1957

Honorable Fred F. Holub
County Attorney
Matagorda County
Bay City, Texas

Opinion No. WW-125

Re: Authority of County to reimburse Pipe Line Company for expenses incurred by virtue of acquiring right of way where there is a preexisting pipe line.

Dear Sir:

The following question was presented in your recent letter:

> "The question that is presented here is that when the State Highway Commission takes over an existing County Road for the purpose of constructing a F.M. Highway and requests additional rights of way to be purchased by the County for a wider right of way than originally included in the County road right of way, and said old County road is crossed by a pipe line of a common carrier, must the County pay said common carrier for meeting State specifications in lowering and additional casing of the pipe line under the widened portion of said right of way?"

In your letter you also offered the following comment:

> "It would appear, taking into consideration Article 6022 and 2351 that although the common carrier would have the right to cross a public road, where same is a County road under Article 2351, the Commissioners Court in its exercise of general control could control the method of crossing and the location of crossing. Here in this case, had the common carrier made a formal notice of crossing, the Commissioners Court, could, it would be reasonable to assume, foresee a future widening of said road and require the crossing to provide for future widening. As it appears that no formal approval or notice of crossing was procured by the common carrier, it would appear that now any additional casing or lowering should be done at the expense of the common carrier."

We refer you to Opinions WW-45 and WW-78 (which are enclosed) holding, in effect, that the expenses for relocation of a utility on right of way already subject to public use, must be borne by the utility rather than the public. However, your question as presented was limited to the proposition of whether or not reimbursement was required to be paid to the pipe line common carrier for meeting State specifications in lowering and additional casing of the pipe line under the new or additional right of way required for the widening program. Attorney General Opinion No. 0-2405A, dated October 9, 1940, which you mentioned you had in your files, states as to the measure of damage in a similar case:

> "Therefore, we are of the opinion that where the state has permitted such corporation as above mentioned to erect and construct its lines under and across public roads, and where the county requires the additional right of way for new highways or public roads over and across the private property of the above mentioned

> corporation, the county would be liable to said corporation *for the expense of casing said lines and burying them at a proper depth . . .*" (Emphasis added).

In *City of Denton* v. *Chastain,* Civ. App. 1941, NWH, 156 S.W. 2d 554, the court held:

> "It has long been the rule in this state that if by the taking of a portion of one's land for public use it becomes necessary to build fences, construct gates, culverts and other things necessary to make the remainder usable and to prevent greater losses sustained by the appropriation of that part taken, evidence of such expenses thus incurred should be considered by the jury in fixing the amount of damages to that part not appropriated. . . ."

Also, see *Pillot* v. *City of Houston,* Civ. App., 1932, NWH, 51 S.W. 2d 794.

Should this right of way have to be condemned, the cost of burying and providing additional casing would not be a separate issue, but should be considered in the general issues of the before and after values of condemnee's property. If, however, this right is acquired by out of court settlement, it seems that there would be no other way to compute what the pipe line company is entitled to but by considering the cost of reburying and providing additional casing, and it is considered that this is supported by ample authority as above set forth.

You pointed out, as above quoted, that you considered this situation different because the pipe line utility had not secured permission of the Commissioners' Court to cross the existing road and that "it would be reasonable to assume" that the Commissioners' Court would "foresee a future widening of said roads and require the crossing to provide

for future widening . . ." and for that reason there should be no liability for reburying and providing additional casing on the portion taken for new or additional right of way.

It is submitted that this proposition has been decided adversely to your contention in *Hammond* v. *Wichita County*, Civ. App., 1956, 290 S.W. 2d 545 (no writ history):

> "Wichita County has no right to destroy appellant's property prior to the lawful appropriation thereof by paying or securing the payment of compensation. City of Fort Worth v. Dietert, Tex. Civ. App., 271 S.W. 2d 299, error refused.
>
> "Conversely, the County has no right to restrain appellant from making lawful use of his property prior to a legal taking thereof by the County."

Hence, assuming, without deciding, that the statutes impose upon the pipe line common carrier the duty of clearing with the Commissioners' Court before crossing a county road, and even assuming that the Commissioners' Court has foreseen the widening, it could not have required the pipe line common carrier to make special preparations, at additional expense, on land not in the then existing right of way as such would have been a restraint upon the use of private property prior to a legal taking thereof.

SUMMARY

Where a pipe line crosses under an existing county road, which road is desired by the State as a Farm to Market road, and additional right of way is required to widen the road, the governmental authority securing this additional right of way is authorized to pay the pipe line common carrier for expenses incurred in meeting state specifications which specifications require the lowering of the pipe line and additional casing

therefore under the widened, or newly acquired, right of way.

Yours very truly,

WILL WILSON
Attorney General of Texas

By /s/ Joe G. Rollins
Joe G. Rollins
Assistant

APPROVED:

OPINION COMMITTEE
H. Grady Chandler, Chairman

Fred Werkenthin
Ralph R. Rash
Jas. W. Wilson

REVIEWED FOR THE ATTORNEY GENERAL BY:

Geo. P. Blackburn

THE ATTORNEY GENERAL OF TEXAS

Austin 11, Texas

This opinion overrules
Opinion No. O-2405

Gerald C. Mann

Hon Fred Norris
County Auditor
Polk County
Livingston, Texas

Opinion No. O-2405-A
Reconsideration of Opinion
No. O-2405
Re: Highways — Pipe Lines

Dear Sir:

In your original request for an opinion of this Department upon the matters therein discussed you attached a copy of a franchise that Polk County granted to the Shell Pipe Line Corporation in 1931. Pursuant thereto, the Shell Pipe Line Corporation laid pipe lines and erected telephone lines under, above, across, etc. the public roads of Polk County. Then in 1938 Polk County was called upon by the State Highway Department to secure right-of-way for various highway constructions, most of which was newly located along the old highway, consequently, the Shell Pipe Line Corporation was called upon to lower its pipe line in several places and to case the pipes at these new locations. Some of these new locations were only a few yards from the old locations, but the above mentioned work was necessary.

About December, 1928, said corporation presented Polk County with an account representing the cost necessitated

by the above mentioned work. The commissioners' court passed an order that the same be paid, but the auditor refused to sign the warrant, and to date the corporation has not received any compensation, but now demands that the account be paid. The present commissioners' court at a recent meeting rescinded the former order of said court passed by their predecessors ordering that the account be paid. Under the above mentioned facts your original inquiry presented the following question:

> "Please advise, as to your opinion, as to whether Polk County owes Shell Pipe Line Corporation anything or not."

And in answer to the above in our original Opinion No. O-2405, it was held in effect that the commissioners' court or Polk County had no authority to pay the claim.

Under the facts stated in the original request it was assumed that the above mentioned corporation was constructing and running its pipe lines under existing public roads. However, under the actual facts presented to this Department the said corporation had right-of-way deeds for all the pipe line laid in Polk County and the new highways crossed the right-of-way of the said corporation at several different places, due to the construction of the new highways, the corporation was forced to lower and case its lines in compliance with the State regulations and law, and at no point along the pipe line did the new highway use the old highway right-of-way.

It is a fundamental principle of law that private property shall not be taken for public use without adequate compensation, and that no person shall be deprived of his property except by due course of law. Therefore, we are of the opinion that where the state has permitted such corporation as above mentioned to erect and construct its lines under

and across public roads, and where the county requires the additional right-of-way for new highway or public roads over and across the private property of the above mentioned corporation, the county would be liable to said corporation for the expense of casing said lines and burying them at a proper depth. We think that our Opinion No. 0-2274, and the authorities cited therein, is applicable to the question here under consideration and enclose a copy of the same for your convenience. Our original Opinion No. 0-2405 is hereby withdrawn.

Trusting that the foregoing fully answers your inquiry, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

By /s/ Ardell Williams
Ardell Williams, Assistant

APPROVED OCT 9, 1940

/s/ Gerald C. Mann
ATTORNEY GENERAL OF TEXAS

AW:BBB:wb

APPROVED: OPINION COMMITTEE
BY BWB Chairman

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